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CHARLES ELMORE

No. 724

In the Supreme Court of the United States

OCTOBER TERM, 1939

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CHICAGO HEIGHTS TRUCKING CO. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

SUPPLEMENTAL BRIEF FOR THE APPELLANTS

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I

Appellees note in their brief the omission from appellants' brief of a specification of errors relied upon. This specification was omitted through inadvertence. The assignments of error appear at R. 495–499. The record also contains a "Statement of points to be relied upon" in which the appellants say "that they will rely upon the points made in their assignments of error in brief and oral argument before this Court on their appeal in the above-entitled cause" (R. 512). Appellants now

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repeat that they urge before this Court all of the errors assigned at R. 495–499.

Appellees claim (Br. pp. 1, 13) that the argument advanced in appellants' brief under Point III, that the decree of the court below is too broad because it extends to those provisions of the Commission's report and order dealing with the proposed truckload and quantity rates, is not covered by the assignments of error. It is submitted that this point is covered by assignment 32 (R. 499), which states that the court below erred, "in concluding, as a matter of law, that the Commission's order is arbitrary, unlawful and void, *and in granting the relief for which plaintiffs prayed.*" [Italics inserted.] The prayer in the complaint (R. 12) asks that the order of the Commission be set aside and the Commission be restrained from enforcing it. No discrimination is attempted in the prayer between those rates in the tariffs which appellees claimed to be lawful and those which they conceded to be unlawful. The district court granted the prayer again without discriminating among the rates.

II

Appellees dispute (Br. 22) the Commission's finding that the proposed rates are "materially lower" than appellees local rates on like traffic between the same points (R. 18), and contend that the proposed rates are not lower. They object to the citation in appellants' brief, by way of illus-

tration, of an instance where the proposed rates are lower than the local first-class rate. It was admitted, on the record, that "in some instances" the proposed rates are lower than the local rates (R. 107). The dissenting Commissioner stated that the proposed rates are "lower than some, but by no means all, of the corresponding local rates" (R. 22, note 2). It also appears from the record that the proposed rates are at a level somewhere between the existing third- and fourth-class rates for local traffic (R. 32, 33, 371, 372). Therefore, in any event, the proposed rates are lower than the applicable local rates on traffic included in the third and higher classes.

Appellees contend, nevertheless, that no comparison should be made between the proposed rates and the rates for the first three classes, but that the comparison should be between the *average* return of appellees from local traffic and the *average* return from the forwarder traffic (which has in the past moved under rates identical with the proposed rates). This comparison, it is said, shows that the proposed rates will, on the average, yield a higher return than the local rates, although it is admitted that two cases show the contrary (Br. p. 23, note 13). However, while there is some confusion in the record on this point,[1] it appears that

[1] Indicative of the confusion is the colloquy between counsel for appellees and Commissioner Rogers (R. 409). Asked to give the Commission "some idea generally" of the difference between the local and the proposed rates, counsel stated that he could not give an answer.

the probable reason why the returns from the forwarder traffic are, in many cases, higher than the returns for the average of local traffic is because the forwarders handle principally traffic in the first to fourth classes, while the local traffic includes traffic of all classes, both low grade and high grade.[2] The Commission was thus justified in refusing to draw the inference that the proposed rates were not lower than the local rates, and in drawing the opposite inference.

The Commission's finding of discrimination rests not only on this difference in the rates but also on the fact of discrimination between large and small shippers. The Commission found that the proposed rates could only be taken advantage of by the forwarders and a very few large shippers (R. 18). Appellees apparently do not contest this finding. As pointed out in appellants' main brief, the proposed rates have, in this respect, the same vice found by this Court to exist in the granting of warehouse privileges to shippers by railroads. *B. & O. R. Co.* v. *United States*, 305 U. S. 507.

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[2] See the colloquy between Mr. Turney, counsel for appellees and Commissioner Caskie at R. 371–372. In the argument before the Commission, counsel for carriers intervening in opposition to the proposed rates, stated, "the forwarding company business is primarily fourth class and higher." (R. 378.) This statement does not appear to have been controverted or challenged. *Cf.* the Commission's statement in *Freight Forwarding Investigation*, 229 I. C. C. 201, 209: "Fourth-class traffic is generally not attractive to forwarders because of the comparatively narrow spread between the railroad carload and less-than-carload rates."

Appellees argue at length (Br. pp. 23–31) that the finding of "unjust discrimination" was unwarranted on the ground that the service under the proposed rates is unlike that under the local rates, that the traffic is different, and that the circumstances and conditions are dissimilar. The validity of these contentions depends upon the inferences to be drawn from the evidence introduced by appellees. The drawing of these inferences was for the Commission and it drew them contrary to appellees' contentions. Appellees' argument is devoted to showing that the Commission was wrong, but that is not a question upon which this Court will rule. Appellees must show that the Commission was arbitrary or capricious, and this they have not shown and cannot show.

Respectfully submitted.

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